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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 600

IN THE MATTER OF THE PEORIA AND EASTERN RAILWAY COMPANY

CHARLES S. ARONSTAM,

Petitioner,

vs.

THE NEW YORK CENTRAL RAILROAD COMPANY, THE CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY AND THE PEORIA AND EASTERN RAILWAY COMPANY,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

CHARLES S. ARONSTAM,
ARTHUR A. BALLANTINE,
JOHN M. HARLAN,
Counsel for Petitioner.

INDEX TO PETITION

	Page
Introduction	1
Opinion below	2
Statutes involved	2
Statement of matter involved	3
Decision of the Special Court on the allowances	7
Jurisdiction	7
Question presented	9
Reasons relied on for allowance of writ	9
1. The Special Court had jurisdiction to grant petitioner an allowance chargeable against the P & E	10
2. Petitioner having rendered his services exclusively for and on behalf of the P & E should be compensated by the P & E	11
Conclusion	17

TABLE OF AUTHORITIES

Cases

Chelrob, Inc. v. *Barrett*, 293 N. Y. 442, 57 N. E. (2d) 825 (1944)	13
Ewen v. *Peoria & E. Ry. Co.*, 34 F. Supp. 332 (S. D. N. Y., 1940), cert. denied, 311 U. S. 700 (1940)	4
Ewen v. *Peoria & E. Ry. Co.*, 78 F. Supp. 312 (S. D. N. Y., 1948)	6, 15
Geddes v. *Anaconda Mining Co.*, 254 U. S. 590, (1921)	13
Leiman v. *Guttman* (No. 88—October Term, 1948, decided January 17, 1949)	8
In re Peoria & Eastern Railway Company, 37 F. Supp. 917 (S. D. N. Y., 1941), cert. denied, 314 U. S. 635 (1941)	10
In re Peoria & Eastern Railway Company, 49 F. Supp. 83 (S. D. N. Y., 1943)	10
Pepper v. *Litton*, 308 U. S. 295 (1939)	13

Page

Seibert v. *Minneapolis & St. Louis Ry. Co.*, 58 Minn. 58, 57 N. W. 1068 (1894) 15

Sprague v. *Ticonic National Bank*, 307 U. S. 161 (1939) 16

In re Watco Corporation, 95 F. (2d) 249 (C. C. A. 7th, 1938) 15

FEDERAL STATUTES

Bankruptcy Act, Chapter X, 52 Stat. 897 (1938) 9

Bankruptcy Act, Chapter XV, 53 Stat. 1134 (1939), 2, 3, 4, 9, 10, 11

Bankruptcy Act, § 710 8

Bankruptcy Act, § 713 ..... 2, 9

Bankruptcy Act, § 725 ..... 2, 8, 9

Bankruptcy Act, § 745 ..... 7, 8

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

The petitioner, Charles S. Aronstam, respectfully prays that a writ of certiorari issue to the United States District Court for the Southern District of New York, to review the final order of that Court, sitting as a three-judge Special Court, entered on December 28, 1948, in the Railroad Adjust-

ment Proceeding entitled In the Matter of The Peoria and Eastern Railway Company (R. 73-75).

Opinion Below

The Per Curiam opinion of the Special Court in connection with the order of December 28, 1948 appears at R. 99-103 and is not yet reported.

Statutes Involved

This proceeding was had under Chapter XV of the Bankruptcy Act, as enacted in 53 Stat. 1134 (1939). The following are the pertinent provisions of Chapter XV:

> "Sec. 713. Immediately following the filing of the petition, there shall be convened a special court of three judges in the manner provided by section 266, as amended, of the Judicial Code, and thereafter all proceedings relative to such plan or any modification thereof shall be conducted before such court. Such three-judge court shall be vested with and shall exercise all the powers of a district court sitting in equity and all the powers as a court of bankruptcy necessary to carry out the intent and provisions of this chapter, including the classification of claims at such time and in such manner as the court may direct."
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> • • • • • • •
>
> "Sec. 725. If the special court shall find—
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> • • • • • • •
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> "(6) That, after hearings for the purpose, all amounts or considerations, directly or indirectly paid or to be paid by or for the petitioner for expenses, fees, reimbursement or compensation of any character whatsoever incurred in connection with the proceeding and plan, or preliminary thereto or in aid thereof, together with all the facts and circumstances relating to the incurring thereof, have been fully disclosed to the Court

so far as such amounts or considerations can be ascertained at the time of such hearings, that all such amounts or considerations are fair and reasonable, and to the extent that any such amounts or considerations are not then ascertainable, the same are to be so disclosed to the Court when ascertained, and are to be subject to approval by the special court as fair and reasonable, and except with such approval no amounts or considerations covered by this clause (6) shall be paid."

Statement of Matter Involved [1]

The Special Court has denied to petitioner an allowance for services together with disbursements, chargeable to the P & E, the debtor in this Chapter XV Railroad Adjustment Proceeding and a controlled subsidiary of the Operating Companies. These services were rendered by petitioner, pursuant to an earlier Order of the Special Court, on behalf of the P & E, in resisting a claim of the Operating Companies against it. The merits with respect to the Special Court's allowance of the greater part of this claim are now before this Court in a petition for certiorari (No. 511) filed by the Income Bondholders on January 14, 1949. A more detailed statement of the facts underlying this proceeding may be found in that petition, pages 3 to 18 inclusive.

Since the inception of the P & E in 1890, the Operating Companies have dominated and controlled its affairs by reason of a majority stock ownership and the provisions of an Operating Agreement (R. 12, 33).

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[1] The following abbreviations of names of the parties are used in this petition.

P & E—the respondent, The Peoria and Eastern Railway Company.

Operating Companies—The New York Central Railroad Company and its controlled subsidiary, The Cleveland, Cincinnati, Chicago and St. Louis Railway Company.

Income Bondholders—The holders of the P & E's Second Mortgage noncumulative 4% Income Bonds, due 1990.

In 1940, the Operating Companies caused the P & E to institute a proceeding for an adjustment of its debts under Chapter XV. The Special Court approved the Plan of Adjustment,[2] but left open the question whether the claim of the Operating Companies against the P & E, amounting to approximately $2,500,000, was valid (R. 8-10, 34-35). In those proceedings, petitioner represented the Income Bondholders Protective Committee, which had intervened therein (R. 70).

In 1943, the Operating Companies petitioned the Special Court for the appointment of a Special Master to hear and report as to the amount and validity of the intercompany accounts between the Operating Companies and the P & E (R. 2-11).

The District Court granted the petition and in its Order of Reference, dated May 21, 1943, appointed Francis H. Horan, Esq., as Special Master (R. 13-14). In said Order the Court designated petitioner to represent the Income Bondholders and empowered him, with the approval of the Special Master, to employ accountants and traffic experts to assist him.[3]

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[2] *Ewen* v. *Peoria & E. Ry. Co.* 34 F. Supp. 332 (S.D.N.Y., 1940), cert. denied 311 U.S. 700 (1940).

[3] The Order with respect to petitioner provided:—

"Ordered that Charles S. Aronstam, counsel for the Income Bondholders' Protective Committee be and is hereby designated as counsel to represent the Income Bondholders of The Peoria and Eastern Railway Company in these proceedings before the Special Master, and that the said counsel with the approval of the Special Master may employ accountants and traffic experts to assist him in connection therewith, and it is further

"Ordered that the compensation of Charles S. Aronstam as counsel for the Income Bondholders and of the accountants and traffic experts, together with the necessary disbursements of said representation, [shall be borne and paid by the Peoria and Eastern Railway Company in such amounts as] * shall be approved and determined by the Court." (R. 14.)

The Special Court at the time it signed the Order gave no explanation as to why it eliminated the provision that the compensation of petitioner

* Struck out in copy.

On June 21, 1943, petitioner, with the approval of the Special Master, retained the firm of Eppler & Company (later merged with Peat, Marwick, Mitchell & Co.) accountants and traffic experts to assist him in the investigation of the intercompany accounts (R. 25-29). Eppler & Company had been suggested to petitioner by the Operating Companies (R. 26).

Thereafter, the Operating Companies, through their own counsel, caused the P & E to apply to the Special Court for permission to retain F. W. H. Adams, Esq., as counsel, to represent it in this proceeding (R. 15-17; cf. R. 11 with R. 17). The Court approved such retention in its Order of July 2, 1943 (R. 22). Thus, the Operating Companies, the creditors herein, were permitted by the Special Court to select the counsel for their adversary, the P & E, in the proceeding to determine the amount and validity of their claim.

In 1943 and 1944, Eppler & Company made a comprehensive study of the intercompany accounts which disclosed, according to the Report submitted by them, that instead of the P & E being indebted to the Operating Companies in the sum of $2,500,000, they owed the P & E an amount in excess of $10,000,000, exclusive of interest (R. 37).

Thereafter, between February 1945[4] and July 1946, hearings were held before the Special Master. Petitioner, acting under the Order of May 21, 1943, carried the bur-

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and the accountants should be paid by the P & E. This modification clearly could not have been intended as, and was not in fact, a bar to charging the P & E with the compensation of petitioner and his accountants and traffic experts, since the Special Court has now charged the P & E with a portion of the compensation of petitioner's accountants and traffic experts, Eppler and Company (R. 71-73). Under the Special Court's Order above quoted, Eppler and Company can have no greater standing to be compensated by the P & E than petitioner.

[4] Since January 1945, Arthur A. Ballantine of the firm of Root, Ballantine, Harlan, Bushby and Palmer, as attorney for an Income Bondholder who owns approximately 25% of the principal amount of the Income Bonds, has been associated with petitioner in this proceeding (R. 38-39).

den of introducing evidence on behalf of the P & E in support of the Income Bondholders' contention that the Operating Companies' accounts with the P & E should be surcharged in an amount in excess of $10,000,000. This evidence was based upon the findings contained in the Eppler Report.

Although the positions taken by the Income Bondholders before the Special Master and the Special Court were exclusively in the interest of the P & E as a whole, nevertheless, on most of the issues, they were opposed by Mr. Adams as counsel for the P & E.

The Special Master and the Special Court, consisting of Circuit Judge L. Hand and District Judges Coxe and Hincks, upheld to a large extent the claim of the Operating Companies. The opinions of the District Court with respect thereto are reported at 78 F. Supp. 312.

Under date of September 29, 1948, petitioner filed an application on behalf of Eppler and Company with the District Court for the approval and payment of the bill of Eppler and Company for their services, in the sum of $119,451.86 (R. 23-32). Under date of December 4, 1948, petitioner filed an application for an allowance for his services in the sum of $90,000; for disbursements in the sum of $30,228.30; and for approval and payment of the bills of Coverdale & Colpitts (consulting engineers) in the sum of $10,092.53, and William Wyer & Co. (railroad management consultants) in the sum of $3,069.55 (R. 32-49). These firms at the request of petitioner, had given expert testimony before the Special Master with respect to certain of the items in the intercompany accounts which were in dispute (R. 44-45).

Under date of November 26, 1948, Mr. Adams filed an application requesting $55,000 for his services (R. 61-69), which amount had been accepted by the dominated P & E, subject to the approval of the Special Court (R. 67).

Decision of the Special Court on the Allowances

The Special Court, in its Per Curiam opinion, held that there was a question as to whether it had jurisdiction to grant an allowance to petitioner, as a charge against the P & E. The Special Court further held that it was unnecessary to decide the jurisdictional problem, for even if it had power it would not grant an allowance to petitioner as a charge against the P & E, because the P & E was "adequately represented" in the accounting phase of this proceeding (R. 71). Consequently, the Special Court denied the application of petitioner for an allowance and disbursements (R. 71), although it recognized that petitioner's services were rendered solely on behalf of the "entire Peoria estate vis-a-vis the New York Central" (R. 71). The Special Court also disallowed the payment of the bills of Coverdale and Colpitts and William Wyer & Co. which were appended to petitioner's application (R. 71).

The Special Court allowed Eppler and Company, who had been retained by petitioner to assist him, $72,073.44 as a proper charge against the P & E, but disallowed the balance of its bill, of $47,005.16[5] (R. 71-73). Mr. Adams, as counsel for the P & E, was allowed $32,000 for his services (R. 70).

Jurisdiction

The order denying petitioner compensation and reimbursement for expenses incurred as against the P & E was entered on December 28, 1948. The jurisdiction of this Court is invoked under §745 of the Bankruptcy Act, as added by ch. 393 of the Laws of 1939, 53 Stat. 1134, 1141. Section 745 provides for review directly to this Court of a final order of the Special Court, on petition for certiorari

[5] Eppler and Company are filing herewith a separate petition for certiorari.

by any person affected by the plan who deems himself aggrieved.[6]

The ascertainment of the amount and validity of the intercompany accounts, which the District Court left open for future determination in its Decree on the Plan of Adjustment was an essential part thereof (R. 34-35). The validity of the claims of the Operating Companies was of the essence of the Plan of Adjustment, and whether the Plan was "in the public interest and in the best interests of each class of creditors and stockholders", Bankruptcy Act, §§ 710 (2) (c) (i), 725 (3), 53 Stat. 1135, 1138. The services for which petitioner seeks an allowance from the P & E were rendered wholly in connection with the settlement of the intercompany accounts between the Operating Companies and the P & E.

Section 725 (6) of the Bankruptcy Act provides that the Special Court may approve a Plan of Adjustment, only if it finds that all fees, expenses, reimbursement or compensation to be paid by the debtor railroad are fair and reasonable. Consequently, the approval or disapproval of the expenses of the debtor railroad is an integral part of the Plan. Similarly, in *Leiman* v. *Guttman* (No. 88-October Term 1948, decided January 17, 1949) this Court said:

> "• • • The incidence of fees on reorganization plans is so great that control over them is deemed indispensable to the court's determination whether the plan should be confirmed. Section 221 (4) provides, indeed, one of the standards by which the court makes that determination."

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[6] Section 745 provides:

"Any final order or decree of the special court may be reviewed by the Supreme Court of the United States upon application for certiorari made by any person affected by the plan who deems himself aggrieved within sixty days after the entry of such order or decree, pursuant to the provisions of the Federal Judicial Code."

Section 725 (6) of Chapter XV is analogous to Section 221 (4) of Chapter X of the Bankruptcy Act (52 Stat. 897).

Petitioner is aggrieved by the denial of the Special Court to allow him compensation and disbursements as against the P & E for services which he rendered to the P & E in connection with its Plan of Adjustment.

Question Presented

Was the Special Court correct in holding under Chapter XV of the Bankruptcy Act, that it should not award compensation and disbursements to petitioner as a charge against the P & E, for services which he concededly rendered for and on behalf of P & E in resisting a claim asserted against it by the Operating Companies, which dominated and controlled it?

Reasons Relied on for Allowance of Writ

The Special Court, in refusing an allowance to petitioner chargeable against the P & E, for his services on its behalf, has rendered an important but erroneous decision which should be reviewed here.

Section 713 of Chapter XV provides that the Special Court "shall be vested with and shall exercise all the powers of a district court sitting in equity and all the powers as a court of bankruptcy necessary to carry out the intent and provisions of this chapter" and Section 725 (6) provides that all amounts "directly or indirectly paid or to be paid by or for the petitioner [debtor railroad] for expenses, fees, reimbursement or compensation of any character whatsoever incurred in connection with the proceeding and plan" are "subject to approval by the special court as fair and reasonable".

1. *The Special Court had jurisdiction to grant petitioner an allowance chargeable against the P & E.*

The Special Court left open the question as to whether it had jurisdiction to grant an allowance to petitioner. The respondents will undoubtedly argue that there was no jurisdiction, relying upon the two decisions the Special Court made with respect to applications of intervenors, who participated in the proceedings upon the Plan of Adjustment. *In re Peoria and Eastern Railway Company,* 37 F. Supp. 917 (1941), cert. denied 314 U. S. 635 and 49 F. Supp. 83 (1943). Those decisions are inapplicable to the present proceeding.

The intervenors, who sought allowances in those decisions, represented only classes of security holders and their efforts were expended in safeguarding and protecting the respective interests of the security holders they represented in the Plan of Adjustment. The Special Court held that it was without jurisdiction under Chapter XV to make allowances out of the debtor railroad for services rendered in the interests of security holders *vis-a-vis* the estate.

In the instant proceeding the situation is entirely different. Here, as will be more fully shown hereinafter, petitioner rendered his services exclusively for the benefit of the P & E, as an entity, in an adversary proceeding with the Operating Companies for the determination of the amount and validity of the intercompany accounts. Moreover, petitioner was not an intervenor or volunteer, but performed his services for the benefit of the P & E, as a whole, by designation of the Special Court in its Order of May 21, 1943 (R. 13-14).

Although the Special Court said that it left open the question of whether it had jurisdiction to grant an allowance to petitioner for his services to the P & E, actually it decided that it had such power. This is demonstrated by

the fact that the Special Court allowed, as a P & E expense, a substantial portion of the bill of Eppler and Company on the ground "that it constituted service to the debtor and should be treated as an item of expense to the debtor" (R. 72). The payment to Eppler & Company shows that the Special Court recognized that it had jurisdiction, under Chapter XV, to award allowances for services rendered to the P & E, even though the person rendering such service was not the titular representative of the P & E.

Eppler and Company was retained by petitioner to assist him in these proceedings, pursuant to the authority given to him by the Special Court. Obviously, if the Special Court had jurisdiction to compensate Eppler & Company for services rendered to the P & E, it had equal jurisdiction to allow petitioner compensation for his services to the P & E.

2. *Petitioner having rendered his services exclusively for and on behalf of the P & E should be compensated by the P & E.*

The Special Court held that even if it had jurisdiction to make an allowance to petitioner, it would not do so because the P & E was "adequately represented" in the accounting phase of this proceeding (R. 71). In so holding, the Special Court completely disregarded the fact that it was the Income Bondholders, through petitioner, who protected and sought to enhance the interests of the P & E and not the counsel who had been designated to represent it by the Operating Companies.

At the time the Special Court signed the Order of Reference and designated petitioner to represent the Income Bondholders, the P & E was completely dominated and controlled by the Operating Companies and did not have counsel to represent it independently in the contemplated adversary proceeding. Since the adversaries were the P & E and the Operating Companies, the Court could have in-

tended only that petitioner's services, as counsel for the Income Bondholders, would be on behalf of the P & E.[7] Otherwise, there would have been no purpose for the Special Court to have designated petitioner to act in the proceeding, because the rights of the Income Bondholders, as a separate class of security holders, were not involved. The participation of the Income Bondholders, derivatively on behalf of the P & E, insured that the P & E and all its public security holders would be represented independently in the adversary proceeding. Petitioner thereupon had the duty and obligation as an officer of the Special Court, to protect and prosecute the interests of the P & E.

It was only after the proceeding had commenced and Eppler and Company had started its investigation of the intercompany accounts, that the Operating Companies sought and obtained the approval of the Special Court to have Mr. Adams act as counsel for the P & E (R. 20-22). Mr. Adams thereafter attempted to prevent petitioner from speaking on behalf of the P & E, but the Special Master rejected such attempt in the following language (R. 39-40):

> "In the light of the original proceeding herein in which Mr. Aronstam [petitioner] was allowed to intervene, and in the light of the order appointing him counsel for the Income Bondholders, it would seem reasonable to think that the court intended that when the New York Central undertook in this proceeding to demonstrate the 'amount and validity' of its claims against the Peoria Mr. Aronstam should be the watchdog to see that the demonstration was adequate."
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> "• • •. I do not believe that the court, which was well acquainted with the case when Mr. Aronstam

[7] The Special Master in his report said:
"• • • that under the Order of reference the adversaries were the P & E and the Operating Companies • • •" (R. 36).

> was appointed in this proceeding, showed by its later approval of the engagement of Mr. Adams that Mr. Aronstam was to have diminished participation in the general overhauling of the accounts which was envisaged by Section 24 of the Supplemental Order."

Mr. Adams rejected almost *in toto* the Eppler Report (R. 72) which showed that instead of the P & E being indebted to the Operating Companies in the approximate sum of $2,500,000, they were in fact indebted to the P & E in a sum in excess of $10,000,000 (R. 37). Mr. Adams' action placed the burden squarely upon petitioner, in accordance with his Court appointed duty, to present in evidentiary form to the Special Master the facts and findings of the Eppler Report, so as to refute the claim of the Operating Companies against the P & E. As the Special Master said (R. 40):

> "It is not, and of course it could not be, Mr. Adams' view that in an accounting proceeding of this character, carried out under Section 24 of the Supplemental Order, *he could say that he had satisfied himself that everything was in order and thus foreclose any further inquiry into the accounts.*" (Emphasis supplied.)

The basic issue in the accounting phase of this proceeding was the question of whether the Operating Companies, by reason of their control and domination of the P & E, were bound in their self-dealing transactions with the P & E by the usual fiduciary standards as enunciated by this Court.[8] Petitioner before the Special Court, urged that the intercompany accounts must be scrutinized in the light of whether the Operating Companies, as fiduciaries, were fair to the P & E in the determination of its income and expenses. Mr. Adams, as counsel for the P & E, contended

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[8] *Geddes* v. *Anaconda Mining Co.*, 254 U. S. 590 (1921); *Pepper* v. *Litton*, 308 U. S. 295, 306 (1939); see also, *Chelrob, Inc.* v. *Barrett*, 293 N. Y. 442, 57 N. E. (2d) 825 (1944).

that the Operating Companies were not bound by the usual fiduciary standards. In the brief that he filed with respect to the petition of certiorari of the Income Bondholders to this Court (No. 511) on the merits, he stated that the Operating Companies did not have any fiduciary duty to the P & E (Brief of the P & E, p. 16). Thus again it should be observed that petitioner has had the burden of protecting the interests of the P & E.

Furthermore, it is pertinent to note that Mr. Adams' appointment to represent the P & E did not provide him with authority to retain independent accountants and traffic experts (R. 22); in fact, he made no independent investigation of the accounts but only consulted officials of the P & E and the Operating Companies (R. 64).[9] It is an admitted fact that the P & E does not have any officials of its own, apart from the Income Bondholder Director, Mr. McInerney, as all its other personnel are employees of the Operating Companies. Mr. Adams did not consult with Mr. McInerney at any time during the proceeding.[10]

The voluminous evidence that petitioner introduced before the Special Master [11] which was based on the Eppler Report, sought to establish that the methods used by the Operating Companies to ascertain the earnings of the P & E were improper, and such a finding by the Special Court would have resulted not only in the Operating Companies being surcharged in an amount exceeding $10,000,000, but would have had far-reaching effects upon the future financial security of the P & E.

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[9] The only independent investigation of the intercompany accounts was made by Eppler and Company, which investigation was made in close cooperation with petitioner (R. 72).

[10] Nor was Mr. McInerney consulted by the Operating Companies with respect to the selection of Mr. Adams to act as counsel for the P & E (R. 55).

[11] The record consisted of 4012 pages of testimony and 577 exhibits, many of which were lengthy and complicated (R. 43).

The opinions of the Special Court on the merits of the controversy reported at 78 F. Supp. 312, clearly demonstrate that petitioner's positions, asserted on behalf of the P & E, were bona fide and in its best interests.

In the light of the foregoing, the Special Court's finding that petitioner could not be compensated out of the P & E estate because it was "adequately represented" is without any basis in fact. Throughout the proceeding, it has been the Income Bondholders, through petitioner, who have sought to protect the interests of the P & E, and not counsel for the P & E. Nor can it be said that the petitioner's services were duplicative of those performed by counsel for P & E, because as shown above, on almost all issues advanced by petitioner for the P & E, he was opposed by counsel for the P & E.

In *Seibert* v. *Minneapolis & St. Louis Ry. Co.*, 58 Minn. 58, 57 N. W. 1068 (1894), the Court said at page 64:

> "And if, for any reason, the bondholders are permitted to appear in the action for the purpose of protecting the trust property, and do, in whole or in part, what the trustee might have thus done, it seems to us that there can be no doubt of the power of the court, upon a proper showing, to make the same reimbursement to them which it might have made to the trustee had he performed the same services and incurred similar expenses."

In *In re Watco Corporation*, 95 F. (2d) 249 (C. C. A. 7th, 1938), the Court said at page 251:

> "* * * it is as important that fees for meritorious services actually rendered and necessary to effectuate a reorganization should be allowed as it is that the court should prevent the undue enrichment of attorneys for services of no value to the debtor."

In the instant case, petitioner, as an officer of the Special Court, pursuant to its Order, performed his services for the

P & E, seeking, as the Special Court recognized, "to advance the interests not of the bondholders alone but of the entire Peoria estate vis-a-vis the New York Central" (R. 71). Likewise, the services of Coverdale and Colpitts and William Wyer & Co. were for and on behalf of the P & E. Their services were necessary and essential in connection with the proper presentation of the items upon which they testified.[12] If the contentions of the Income Bondholders on these items had been upheld, the testimony of these experts would be vital to determine the amounts of surcharge against the Operating Companies in favor of the P & E, and their bills should be paid by the P & E.

Petitioner performed his services over a period of five years and incurred disbursements of more than $30,000 upon the belief and faith that the Special Court intended by its Order to have petitioner protect and safeguard the interests of the P & E in the accounting phase of this proceeding, and that he and his witnesses would be compensated therefor by the P & E. The suggestion by the Special Court that petitioner's only recourse for compensation and disbursement was against the Income Bondholders, would result in one class of security holders paying for services which were rendered for the entire estate of the P & E.

This Court has always considered the payment of fees to counsel in a proper cause an important part of judicial administration. In *Sprague* v. *Ticonic National Bank*, 307 U. S. 161 (1939), this Court said:

> "Allowance of such costs in appropriate situations is part of the historic equity jurisdiction of the federal courts" (at p. 164).

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[12] The Coverdale and Colpitts witnesses testified that on sales of second hand equipment (freight cars and locomotives) by the Operating Companies to the P & E, the latter had been overcharged $464,952; William Wyer testified that the value of the Indianapolis trackage rights which the Operating Companies acquired from the P & E without paying any consideration was $100,000 (R. 44-45).

"• • • Plainly the foundation for the historic practice of granting reimbursement for the costs of litigation other than the conventional taxable costs is part of the original authority of the chancellor to do equity in a particular situation" (at p. 166).

"• • • As in much else that pertains to equitable jurisdiction, individualization in the exercise of a discretionary power will alone retain equity as a living system and save it from sterility. In the actual exercise of the power to award costs 'as between solicitor and client' all sorts of practical distinctions have been taken in distributing the costs of the burden of the litigation" (at p. 167).

Conclusion

The refusal of the Special Court to compensate petitioner for his services together with his disbursements, including the bills of Coverdale and Colpitts and William Wyer & Co. as a charge against the P & E is tantamount to a repudiation by the Special Court of its own Order and so far departs from sound equitable principles as to call for the exercise of this Court's power of supervision; this being the only Court having appellate jurisdiction to review the grave injustice contained in the Special Court's Order of December 28, 1948.

WHEREFORE, it is respectfully submitted that this petition for certiorari to review the final order of the Special District Court for the Southern District of New York should be granted.

CHARLES S. ARONSTAM,
ARTHUR A. BALLANTINE,
JOHN M. HARLAN,
Counsel for Petitioner.

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Supreme Court of the United States

OCTOBER TERM, 1948.

No. 600.

In the Matter

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THE PEORIA AND EASTERN RAILWAY COMPANY.

CHARLES S. ARONSTAM,

Petitioner,

—against—

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Respondents.

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Respondents.

BRIEF OF RESPONDENTS, THE NEW YORK CENTRAL RAILROAD COMPANY AND THE CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI.

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INDEX.

	PAGE
Statement	1
Jurisdiction of This Court	5
Issue Before This Court	6
Petitioners' Applications for Allowances Were Properly Denied	6
Conclusion	11

TABLE OF AUTHORITIES:

Baltimore and Ohio Railroad Company, In re, 34 F. Supp. 154, cert. den. 311 U. S. 717 ..... 6, 7

Colquette v. *Crossett Lumber Co.,* 149 F. (2d) 116 (C. C. A. 8th) 10

Denney, In re, 135 F. (2d) 184 (C. C. A. 7th) 10

Ewen, et al. v. *Peoria and Eastern Railway Company,* 34 F. Supp. 332, cert. den. 311 U. S. 700 2

Ewen, et al. v. *Peoria and Eastern Railway Company,* 78 F. Supp. 312, cert. den. 336 U. S. 919 ..... 4, 9

Income Bondholders of the Peoria and Eastern Railway Company v. *The New York Central Railroad Company, et al.,* 336 U. S. 919 4

Peoria and Eastern Railway Company, In re, 37 F. Supp. 917, cert. den. 314 U. S. 635 ..... 2, 7

Schweidel v. *Lehigh Valley Railroad Co., et al.,* unreported order Oct. 21, 1940, cert. den. 312 U. S. 684 7

Spencer v. *Babylon R. Co.,* 250 Fed. 24 (C. C. A. 2nd) 10

Sterling Industries, Inc. v. *Ball Bearing Pen Corp., et al.,* 298 N. Y. 483 ..... 8, 9

Statutes:

Bankruptcy Act, 53 Stat. 1134 ..... 2, 5, 6, 7

Bankruptcy Act, § 745 5

Bankruptcy Act, § 706 5

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 600.

In the Matter

of

THE PEORIA AND EASTERN RAILWAY COMPANY.

CHARLES S. ARONSTAM,

Petitioner,

—against—

THE NEW YORK CENTRAL RAILROAD COMPANY, THE CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY, and THE PEORIA AND EASTERN RAILWAY COMPANY,

Respondents.

No. 601.

EPPLER & COMPANY,

Petitioner,

—against—

THE NEW YORK CENTRAL RAILROAD COMPANY, THE CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY, and THE PEORIA AND EASTERN RAILWAY COMPANY,

Respondents.

BRIEF OF RESPONDENTS, THE NEW YORK CENTRAL RAILROAD COMPANY AND THE CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI.

Statement.

Petitioners seek writs of certiorari to review an order of the United States District Court for the Southern District of New York, entered December 28, 1948, denying petitioners' applications for allowances

for services and disbursements which they seek to charge against the Peoria and Eastern.* The order denies *in toto* the application of petitioner Aronstam for allowance of legal fees and disbursements and denies that part of the application of petitioner Eppler which seeks an allowance for preparing evidence and testifying in hearings before a Special Master.

The services for which compensation is sought by both petitioners were rendered in a railroad adjustment proceeding brought by the Peoria and Eastern under the provisions of former Chapter 15 of the Bankruptcy Act (53 Stat. 1134). By decree entered July 8, 1940 (*Ewen, et al.* v. *Peoria and Eastern Railway Company,* 34 F. Supp. 332, cert. denied 311 U. S. 700), and order supplemental to decree dated April 29, 1941 (*In re Peoria and Eastern Railway Company,* 37 F. Supp. 917, cert. denied 314 U. S. 635), a three-judge Special Court granted the petition of the Peoria and Eastern for adjustment of its maturing bond indebtedness, but left open for future determination all questions concerning the amount and validity of the accounts between the Peoria and Eastern and the Operating Companies. In April, 1943, the Special Court granted the petition of the Operating Companies for the appointment of a special master to hear and report on the amount and validity of the inter-company accounts (R. 13-14).

---

* The parties will be referred to herein as follows: Peoria and Eastern—The Peoria and Eastern Railway Company; New York Central—The New York Central Railroad Company; Big Four—The Cleveland, Cincinnati, Chicago and St. Louis Railway Company; Operating Companies—New York Central and Big Four.

The order appointing the Special Master, which was prepared and submitted by petitioner Aronstam, also provided:

> "Ordered that Charles S. Aronstam, counsel for the Income Bondholders' Protective Committee be and is hereby designated *as counsel to represent the Income Bondholders* of The Peoria and Eastern Railway Company in these proceedings before the Special Master, and that the said counsel with the approval of the Special Master may employ accountants and traffic experts to assist him in connection therewith, and it is further
>
> "Ordered that the compensation of Charles S. Aronstam as counsel for the Income Bondholders and of the accountants and traffic experts, together with the necessary disbursements of said representation [shall be borne and paid by the Peoria and Eastern Railway Company in such amounts as],* shall be approved and determined by the court" (R. 14). (Emphasis ours.)

* The language in brackets was stricken out by the Court before signing the order.

Thereafter petitioner Aronstam retained petitioner Eppler as accountants and traffic experts; petitioner Eppler investigated the intercompany accounts between the Operating Companies and the Peoria and Eastern and made a report to petitioner Aronstam; and, on the basis of said report and the testimony of petitioner Eppler in support thereof, petitioner Aronstam asserted claims in large amounts against the Operating Companies in the hearings before the Special Master.

The Peoria and Eastern was represented at the hearings before the Special Master by F. W. H.

Adams, Esq., whose appointment as counsel for the Peoria and Eastern was approved by order of the Special Court (R. 22). Mr. Adams also advanced claims against the Operating Companies, including items upon which some of the Income Bondholders' claims were based.

At the conclusion of the hearings the Special Master rendered his report recommending dismissal or disallowance of all claims with the exception of claims in the total principal amount of approximately $130,000. Upon the unanimous decision of the Special Court (*Ewen, et al.* v. *Peoria and Eastern Railway Company,* 78 F. Supp. 312) a decree was entered confirming the report of the Special Master with slight modifications. A petition for a writ of certiorari to review that decree was denied by this Court on February 28, 1949 (*Income Bondholders of the Peoria and Eastern Railway Company* v. *The New York Central Railroad Company, et al.,* 336 U. S. 919).

Petitioner Aronstam made application to the Special Court for fees and disbursements in the total amount of $133,390.38 (R. 33-53), and application on behalf of petitioner Eppler for an allowance for services and disbursements in the total amount of $119,451.86 (R. 23-32) to be charged against the Peoria and Eastern.

The Special Court by unanimous decision (R. 69-73) denied the application of petitioner Aronstam, and denied that part of the application of petitioner Eppler which represented services and disbursements in preparing evidence and testifying, and entered the order here sought to be reviewed (R. 73-75).

Jurisdiction of This Court.

Before discussing the merits of the pending applications for certiorari, we beg leave to refer to the statutory provision upon which the petitioners base their claim of the Court's jurisdiction (Petition, Aronstam, p. 7; Petition, Eppler, p. 7).

Chapter 15 of the Bankruptcy Act, which was approved July 28, 1939 and expired by its own terms on July 31, 1940, provided a simple and inexpensive method for railroads which were solvent, but temporarily unable to meet maturing debts, to adjust such debts. The law authorized the approval of a plan of adjustment by a three-judge Special Court and specified the parties entitled to appeal and the method by which appeal might be taken. Section 745 of the statute, upon which petitioners rely, provides:

> "Any final order or decree of the special court may be reviewed by the Supreme Court of the United States upon application for certiorari made by any person affected by the plan who deems himself aggrieved * * *"

Petitioners argue that they are "aggrieved" by this portion of the plan but fail to consider the effect of Section 706 of the Act, the terms of which preclude these applications by petitioners. That section provides:

> "No creditor shall be deemed to be 'affected' by any plan unless such plan proposes a modification of the evidence of debt or other instrument defining the rights of such creditor, or a modification of the security, if any, for the claim of such creditor."

The order complained of neither "proposes a modification of the evidence of debt or other instrument defining the rights" of the petitioners "or a modification of the security, if any", for the claim of petitioners.

Issue Before This Court.

The question of jurisdiction to one side, the only issue presented on these applications is petitioners' contentions that the decision of the Special Court is erroneous.

Petitioners' Applications for Allowances Were Properly Denied.

The Special Court found it unnecessary to decide the question whether it had jurisdiction under the statute to make the allowances requested, but it is clear from the consistent holdings in all of the cases brought under Chapter 15 of the Bankruptcy Act that the Court had no such jurisdiction. Petitioners here contend that their services "protected the interests" of the Peoria and Eastern (Petition, Aronstam, pp. 11, 12, 15) and that they occupy the same status as receivers or trustees in reorganization proceedings (Petition, Eppler, pp. 10, 11, 12). These contentions are the same arguments advanced by representatives of security holders in the *Baltimore and Ohio* case, the *Lehigh Valley* case and the instant case, in each of which the Court found that under the terms of the Act it had no jurisdiction to grant such allowances, and in each of which petitions for certiorari were denied by this Court. *In re Baltimore and Ohio Railroad Company,* 34 F. Supp. 154, cert.

den. 311 U. S. 717; *Schweidel* v. *Lehigh Valley Railroad Co. et al.,* unreported order Oct. 21, 1940, cert. den. 312 U. S. 684; *In re Peoria and Eastern Railway Company,* 37 F. Supp. 917, cert. den. 314 U. S. 635.

In all of those cases the courts clearly recognized the distinction, as to allowances, between Chapter 15 of the Bankruptcy Act dealing exclusively and comprehensively with *adjustments* and other chapters dealing with *reorganizations,* and denied applications of intervenors for allowances. In the instant case, at the conclusion of the adjustment proceeding, petitioner Aronstam made application for allowances. In denying the petition the Court said (*In re Peoria and Eastern Railway Company, supra,* p. 921):

> "It seems to us clear that Chapter 15 of the National Bankruptcy Act covering Railroad *Adjustments,* in so far as allowances to others than the petitioner Railway are concerned, is not in *pari materia* with Title 11 United States Code, Section 205, 11 U. S. C. A. §205, which deals with the Reorganization of Railroads. * * *
>
> It seems to us that the omission of such a provision from Chapter 15 of the National Bankruptcy Act, which gave a three-judge court jurisdiction in *Proceeding for Railway Adjustment,* makes it quite clear that we have not any jurisdiction properly to grant any allowances herein to the intervenors or their counsel."

Certiorari was denied, 314 U. S. 635.

The services for which petitioners now seek compensation were rendered on behalf of the Income

Bondholders. The order of appointment prepared and submitted by petitioner Aronstam and signed by the Court provides that Mr. Aronstam "is hereby designated as counsel to represent the Income Bondholders of The Peoria and Eastern Railway Company in these proceedings before the Special Master, and that the said counsel with the approval of the Special Master may employ accountants and traffic experts to assist him in connection therewith" (R. 14). The provision in the proposed order providing that the compensation of petitioners as counsel, accountants and traffic experts "shall be borne and paid by the Peoria and Eastern Railway Company" was stricken from the order by the Court before signing.

In addition, the Special Court approved the appointment of independent counsel to represent the Peoria and Eastern in the proceeding, and in doing so overruled the objection by petitioner Aronstam that his "representation of the Income Bondholders is in effect tantamount to representing the Peoria and Eastern" (R. 20).

Under such circumstances, if the Special Court had any jurisdiction to make allowances to petitioners, such jurisdiction could be based only upon the general equity powers of the court, and the compensation of petitioners as representatives of a class of security holders, would depend on the benefit accruing to the corporation from their efforts. This familiar rule was recently stated by the New York Court of Appeals in *Sterling Industries, Inc.* v. *Ball Bearing Pen Corp., et al.,* 298 N. Y. 483, 493:

> "If the Middleman-Shindel group has a cause of action, its rights will be fully protected in

> equity and its counsel compensated from any recovery and only from a recovery on behalf of the corporation, subject to the approval of the court. If there be no cause of action, the plaintiff corporation will not have that discovered in equity at its expense."

The petitions herein emphasize petitioners' labors in preparing and advancing claims against the Operating Companies in amounts in excess of ten million dollars (Petition, Aronstam, pp. 5, 6, 13, 14; Petition, Eppler, pp. 5, 9, 13, 14); but these claims, with the exception of claims in the principal amount of approximately $130,000 all of which were either instituted by or supported by Mr. Adams as counsel for the Peoria and Eastern, were disallowed (*Ewen, et al.* v. *Peoria and Eastern Railway Company,* 78 F. Supp. 312, cert. den. 336 U. S. 919). Not only did the Peoria and Eastern not benefit from the efforts of petitioners but the activities of the Income Bondholders, whom petitioners represented, resulted in actual net loss to the Peoria and Eastern (R. 57-59).

The Special Court, in denying petitioners' applications, said (R. 71):

> "For even if we had power to make the allowance requested we feel that we could not properly charge against the estate of a debtor adequately represented an expense incurred solely at the instance of the bondholders. Petitioning counsel himself disclaims any retainer, direct or indirect, by or in behalf of the debtor. Rather, he relies upon the court's order of May 21, 1943. But the plain language of that order approved only his requested designation to represent the income

bondholders and his request then made for an order that the compensation for such representation be eventually charged against the estate of the petitioning debtor was unequivocally rejected by the court.

It follows, therefore, that as a charge against the Peoria this petition must be wholly disallowed, —disallowed not only as to the compensation of counsel and his disbursements listed in his petition as incurred and paid but also as to the appended bills of the expert witnesses retained by the petitioner without request or authorization either by the debtor or by the court."

* * * *

"It appears, however, that these experts [Eppler] rendered further service in assisting counsel for the bondholders to prepare for the hearings and in testifying at his call. Such services, like those of the other expert witnesses retained and called by counsel for the bondholders, we cannot classify as expenses of the debtor's estate."

There is an additional reason why the Eppler petition should be denied. After the entry of the order petitioner Eppler requested and received payment of the amount allowed by the court. "The general rule is well settled that unless there is a separable controversy, or unless there is some sum to which the appealing party is entitled in any event, he may not accept the benefit of the decree and later appeal." *Spencer* v. *Babylon R. Co.*, 250 Fed. 24, 26 (C. C. A. 2nd); In re *Denney*, 135 F. (2d) 184 (C. C. A. 7th); *Colquette* v. *Crossett Lumber Co.*, 149 F. (2d) 116 (C. C. A. 8th).

Conclusion.

We respectfully submit that the order of the Special Court properly denied petitioners' applications for allowances and that no reasons have been shown which warrant review by this Court.

Respectfully submitted,

GERALD E. DWYER,
Counsel for Respondents, The New York Central Railroad Company and The Cleveland, Cincinnati, Chicago and St. Louis Railway Company.

SAMUEL H. HELLENBRAND,
LEE P. GAGLIARDI,
Of Counsel.

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CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1948.

No. 600.

In the Matter
of
THE PEORIA AND EASTERN RAILWAY COMPANY.

CHARLES S. ARONSTAM,
Petitioner,

—against—

THE NEW YORK CENTRAL RAILROAD COMPANY, THE CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY, and THE PEORIA AND EASTERN RAILWAY COMPANY,
Respondents.

No. 601.

EPPLER & COMPANY,
Petitioner,

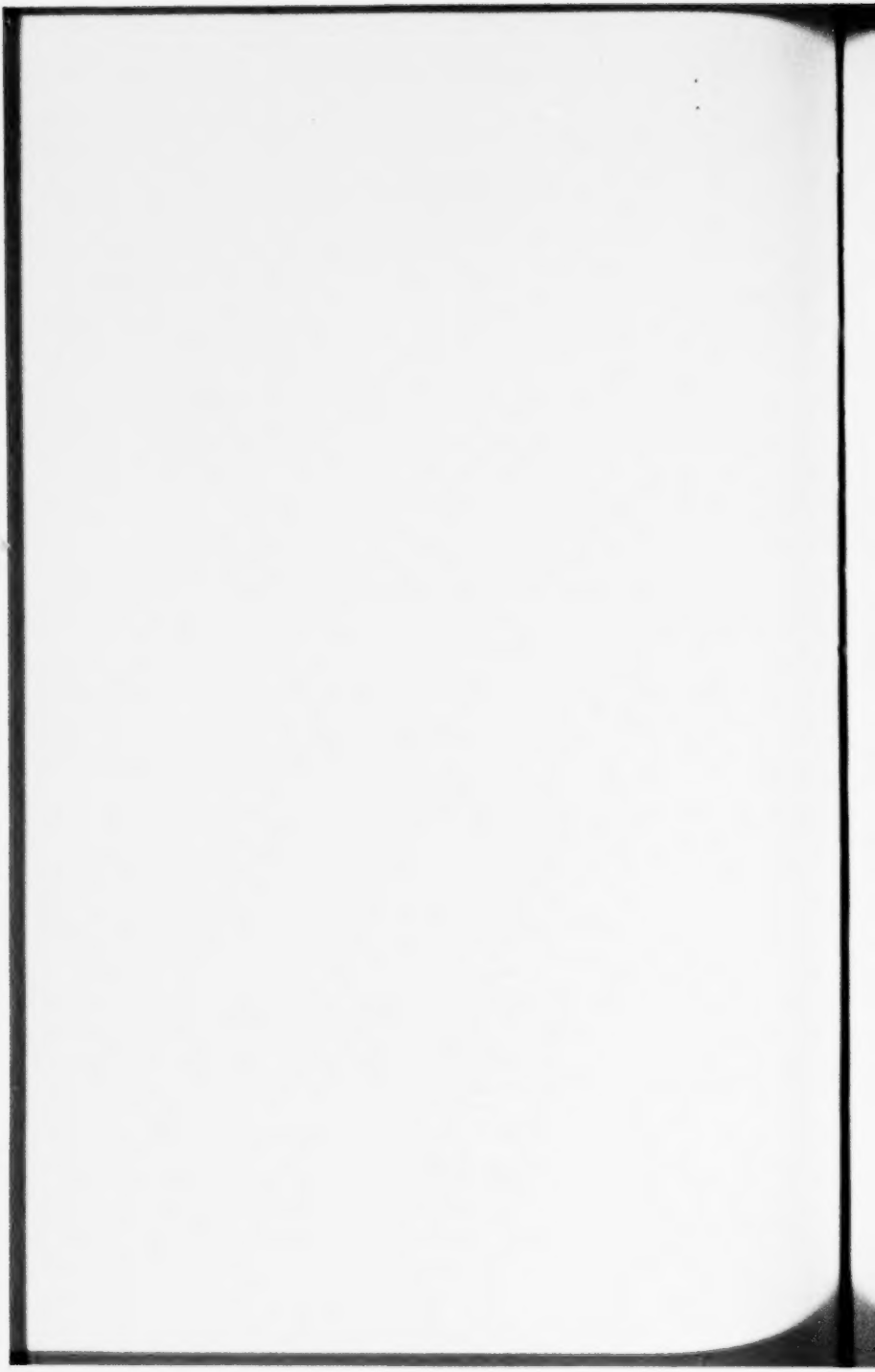
—against—

THE NEW YORK CENTRAL RAILROAD COMPANY, THE CLEVELAND, CINCINNATI, CHICAGO AND ST. LOUIS RAILWAY COMPANY, and THE PEORIA AND EASTERN RAILWAY COMPANY,
Respondents.

BRIEF OF RESPONDENT, THE PEORIA AND EASTERN RAILWAY COMPANY, IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI.

F. W. H. ADAMS,
Counsel for Respondent, The Peoria and Eastern Railway Company.

PETER KEBER,
Of Counsel.



INDEX.

PAGE

Statement 1

Argument:

I—This Court has no jurisdiction 8

II—The Special Court had no jurisdiction to grant petitioners allowances chargeable against the Peoria 9

III—No basis existed for granting the allowances sought 11

Conclusion 14

TABLE OF CASES CITED:

Altman v. *Shopping Center Bldg. Co.*, 82 Fed. 2d 521 9

Baltimore and Ohio Railroad Company, 34 F. Supp. 154, cert. denied 311 U. S. 717 10

Colquette v. *Crossett Lumber Co.*, 149 Fed. 2d 116 . . 9

Ewen, et al. v. *Peoria and Eastern Railway Company*, 34 F. Supp. 332, cert. denied 311 U. S. 700 . . . . . 3, 12

Ewen, et al. v. *Peoria and Eastern Railway Co.*, 78 F. Supp. 312 6

Income Bondholders of the Peoria and Eastern Railway Co. v. *The New York Central Railroad Company, et al.*, 336 U. S. 919 7

Kaiser v. *Standard Oil Co.*, 89 Fed. 2d 58 9

Peoria and Eastern Railway Company, The, In the Matter of, 239 I. C. C. 303 2

Peoria and Eastern Railway Co., In re, 37 F. Supp. 917 (1941), cert. denied 314 U. S. 635 . . . . . 3, 9, 10

PAGE

Peoria and Eastern Railway Co., In re, 49 F. Supp. 83 (1943) 9

Schweidel v. *Lehigh Valley Railroad Company*, unreported order, October 21, 1940, cert. denied 312 U. S. 684 10

Storley, et al. v. *Armour & Co.*, 107 Fed. 2d 499 9

Terry v. *Abraham, et al.*, 93 U. S. 38 9

Winkelman v. *General Motors Corp.*, 48 F. Supp. 504.. 13

OTHER AUTHORITIES CITED:

Bankruptcy Act:
Chapter XV (53 Stat. 1134) 2, 8, 10
Section 706 8
Section 745 8
Section 755 8

The Counsel Fee in Derivative Stockholders' Suits, 39 Columbia Law Review 784 13

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Respondents.

BRIEF OF RESPONDENT, THE PEORIA AND EASTERN RAILWAY COMPANY, IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI.

Statement.

Charles S. Aronstam, Esq., as counsel for the Income Bondholders, and Eppler and Company (herein called Eppler), accountants, retained by Mr. Aron-

stam as such counsel, pray that writs of certiorari issue to the United States District Court for the Southern District of New York, sitting as a three-judge Special Court, to review the order of that Court, entered December 28, 1948 (R. 73-75). That order denied their separate claims for services and disbursements said to have been rendered in the Railroad Adjustment Proceeding affecting the Peoria and Eastern Railway Company.*

The Railroad Adjustment Proceeding in which the petitioners claim compensation was originally commenced in 1940 by the Peoria pursuant to Chapter XV of the Bankruptcy Act (53 Stat. 1134)** for approval of a Plan of Adjustment which had been approved by the Interstate Commerce Commission (239 I. C. C. 303). The adjustment was sought because in 1940 the First Mortgage Bonds of the Peoria were about to become due, and an agreement made in 1890, under which the Peoria was operated by the Big Four and later, by the New York Central, was about to expire.

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* We have used the following abbreviations:

P. & E., or the Peoria—the respondent, The Peoria and Eastern Railway Company.

Big Four—the respondent, The Cleveland, Cincinnati, Chicago and St. Louis Railway Company.

New York Central—the respondent, the New York Central Railroad Company, controlling stockholder of the Big Four and after 1930 lessee of its property, including its interest in the P. & E.

Operating Companies—New York Central and Big Four.

Income Bondholders—a Protective Committee of the P. & E.'s Second Mortgage non-cumulative 4% Income Bonds, due 1990.

** The statute expired on July 31, 1940, except for pending proceedings, of which the Adjustment Proceeding, in which these claims were made, is one.

The District Court, by a decree entered on July 8, 1940, approved the Plan of Adjustment (*Ewen, et al.* v. *Peoria and Eastern Railway Company,* 34 F. Supp. 332, cert. denied 311 U. S. 700; *In re Peoria and Eastern Railway Co.,* 37 F. Supp. 917, cert. denied 314 U. S. 635). However, at the insistence of the Income Bondholders, represented then as now by the petitioner, Aronstam (R. 70), the question of the amount and validity of the accounts between the operating companies and the Peoria was left open for future determination. It was specifically provided, again at the insistence of the petitioner, Aronstam, that should the operating companies attempt, in any year, to withdraw any assets or earnings of the P. & E., upon objection by the representative of the Income Bondholders, the operating companies were required to establish their right to do so (R. 9, 21).

On April 1, 1943, after objection by the representative of the Income Bondholders to the annual accounts, the New York Central petitioned for an order appointing a Master under the decree to hear and report upon the validity and amount of the claim of the operating companies against the Peoria for advances in the sum of $2,356,687.33 as of December 31, 1942 (R. 2-11).

This petition was on notice to the petitioner, Aronstam, as attorney for the Income Bondholders Committee. On their behalf he answered, consenting to the appointment of the Master (R. 11-13).

The petitioner, Aronstam, then submitted an order providing for the appointment of the Special Master and also providing for his own appointment as attorney for the Income Bondholders, with his compensa-

tion to be paid by the Peoria (R. 4, 14, 19). The Court signed the order on May 23, 1943 but struck therefrom the provision requiring the Peoria to pay the compensation of petitioner Aronstam. The order, with the provision so stricken out shown in brackets, reads as follows:

> "Ordered that Charles S. Aronstam, counsel for the Income Bondholders' Protective Committee be and is hereby designated as counsel to represent the Income Bondholders of The Peoria and Eastern Railway Company in these proceedings before the Special Master, and that the said counsel with the approval of the Special Master may employ accountants and traffic experts to assist him in connection therewith, and it is further
>
> Ordered that the compensation of Charles S. Aronstam as counsel for the Income Bondholders and of the accountants and traffic experts, together with the necessary disbursements of said representation, [shall be borne and paid by the Peoria and Eastern Railway Company in such amounts as] L. H., J. M. W., G. M. H. shall be approved and determined by the Court."

In view of the relationship between the New York Central and the Peoria, arising out of the stock control of the Peoria by the New York Central, and arising out of the operating agreement, the New York Central and the Big Four recognized the desirability of the Peoria's securing independent counsel to represent it in connection with the settlement of the inter-company accounts (R. 16, 17, 62).

On July 2, 1943, upon the petition of the New York Central, the Court appointed the undersigned, who

had no prior relationship with any of the parties, as an independent attorney to represent the Peoria (R. 22, 62). The appointment was on the specific understanding that the undersigned should protect the interests of the Peoria to the best of his ability as an attorney without regard to any stock or other control by the New York Central (R. 68, 69).

Thereafter, petitioner Aronstam retained Eppler, as accountants and traffic experts to assist him, as counsel for the Income Bondholders. This appointment was approved by the Special Master before the appointment of the undersigned as independent counsel to the Peoria. At the first hearing before the Special Master thereafter it was made clear that the undersigned, as independent counsel for the Peoria, did not consent to the payment of any of its funds to Eppler for services (R. 75-79).

Eppler then investigated the inter-company accounts and made a report. On the basis of this report petitioner Aronstam asserted claims against the operating companies before the Master in excess of $12,000,000, exclusive of interest (R. 37).

It is suggested that the positions taken by the Income Bondholders at the hearings before the Master were opposed by the undersigned. (Aronstam petition, p. 6; Eppler petition, p. 13.)

This is not the case (R. 58). After his appointment as independent counsel, the undersigned considered the proposed accounts, independently investigated the records of both the Peoria and the Operating Companies and generally investigated all possible issues (R. 62-65). With respect to each issue, consideration was given not only to the overall interests of the Peoria in relation to past transactions, but also in relation to its future welfare, without regard to the

special interests of any particular group of security holders (R. 58). The mere fact that the Income Bondholders saw fit to assert a particular claim did not, in our view, create an identity of interest between the P. & E. and the Income Bondholders, or provide a sufficient basis for adopting it. For the same reasons, where a claim of the Income Bondholders appeared to be detrimental to the best interests of the P. & E., it was, without hesitation, opposed. It is perhaps significant in this regard that the only claims allowed in this case, out of the $12,000,000 asserted by the petitioners, were those originated or supported by the undersigned (R. 58).

After hearings before the Special Master, and the coming in of his report, the Court, with minor adjustments, unanimously approved his report. (*Ewen, et al.* v. *Peoria and Eastern Railway Co.*, 78 F. Supp. 312.) The final result was that out of the enormous claims, both in number and amount, asserted by the petitioners, claims of $176,206.36, including interest, were allowed by the Court. The allowed claims, as above stated, were all either originated or supported by the undersigned (R. 57).

The allowance of these claims, however, actually was not a gain for the Peoria but, in fact, constituted a loss. Actually the whole adjustment, including all interest allowances and conceded adjustments, amounted to $246,240.68 (R. 57). However, the Peoria was, by the action of the Income Bondholders in objecting to the accounts, compelled to pay interest, at 6%, on the total advances of the operating companies instead of receiving credit on its earnings (R. 57, 58). This interest was $342,637.47 (R. 58).

The result, therefore, of the proceedings brought about by the petitioner, Aronstam, was that the Peoria

lost the difference between $342,637.47 interest incurred and the sum of $246,240.68, the benefits alleged to have been obtained by the Income Bondholders, or $96,396.70, before the granting of any allowances (R. 58).

After the entry on November 16, 1948 of the decree establishing this loss, the Income Bondholders petitioned for a writ of certiorari for its review. This petition was denied by this Court on February 28, 1949. (*Income Bondholders of the Peoria and Eastern Railway Co.* v. *The New York Central Railroad Company, et al.*, 336 U. S. 919.) Therefore, the whole of this proceeding has finally concluded with a loss to the Peoria, before considering expenses, of at least $96,396.70.

The petitioner Aronstam, after the entry of the final decree on November 16, 1948, applied to the Special Court for fees and disbursements aggregating $133,390.38 (R. 33-53) and made an application on behalf of Eppler for services and disbursements in the sum of $119,451.86 (R. 23-32).

The application of Aronstam was unanimously rejected by the Special Court (R. 70-71). Eppler's application was allowed in respect of the part of its services devoted to preparing a report, and denied in respect of its claim for assisting counsel for the Income Bondholders to prepare for the hearings and testify at his call (R. 71-73).

Both Aronstam and Eppler now pray for writs of certiorari to review the order of the Special Court, entered December 28, 1948.

ARGUMENT.

I.

This Court has no jurisdiction.

(a)

Both petitioners claim that this Court has jurisdiction under Section 745 of Chapter XV of the Bankruptcy Act (1939, 53 Stat. 1134) which, as we have seen, expired by its terms on July 31, 1940 (Section 755) (Aronstam petition, p. 7; Eppler petition, p. 7). That section provides as follows:

> "Any final order or decree of the special court may be reviewed by the Supreme Court of the United States upon application for certiorari made by any person affected by the plan who deems himself aggrieved * * *"

The petitioners do not come within the definition of those "affected" by the plan. Thus Section 706 provides:

> "No creditor shall be deemed to be 'affected' by the plan unless such plan proposes a modification of the evidence of debt or other instrument defining the rights of such creditor, or a modification of the security, if any, for the claim of such creditor."

No assertion is made, nor could one be made, that the order sought to be reviewed "proposes a modification of the evidence of debt or other instrument defining the rights" of the petitioners, or of their security.

It therefore follows, in our respectful submission, that since the petitioners are not "affected" by the plan there is no basis for the granting of writs of certiorari to review the order denying their claims.

(b)

In any case, Eppler has no right to be heard in this Court. The order sought to be reviewed, as we have stated, allowed a part of the amount applied for. This amount has been paid to Eppler and accepted by it. Under these circumstances, the right of appeal is lost. "Accepting the fruits of a judgment and thereafter appealing therefrom are totally inconsistent positions, and the election to pursue one course is deemed an abandonment of the other." *Kaiser* v. *Standard Oil Co.*, 89 Fed. 2d 58; see also, *Terry* v. *Abraham, et al.*, 93 U. S. 38; *Altman* v. *Shopping Center Bldg. Co.*, 82 Fed. 2d 521, 527; *Storley, et al.* v. *Armour & Co.*, 107 Fed. 2d 499, 504; *Colquette* v. *Crossett Lumber Co.*, 149 Fed. 2d 116.

II.

The Special Court had no jurisdiction to grant petitioners allowances chargeable against the Peoria.

The Special Court in refusing the allowances requested found it unnecessary to determine whether it had jurisdiction to grant such allowances under the statute. However, in two earlier decisions in this same adjustment proceeding the Special Court found that it lacked such jurisdiction. (*In re Peoria and Eastern Railway Company*, 37 F. Supp. 917 (1941), cert. denied 314 U. S. 635 and 49 F. Supp. 83 (1943).)

These determinations were made after the Plan of Adjustment was approved and when petitioner Aronstam, then as now representing the Income Bondholders, claimed compensation for his services.

In those decisions the Special Court, following the holdings in *Baltimore and Ohio Railroad Company,* 34 F. Supp. 154, cert. denied 311 U. S. 717, and *Schweidel* v. *Lehigh Valley Railroad Company,* unreported order, October 21, 1940, cert. denied 312 U. S. 684, held that in Adjustment Proceedings under Chapter XV as distinguished from Reorganization Proceedings, the Court had no power to grant allowances except to the debtor railroad. Thus the Court said (37 F. Supp. 917, 921):

> "It seems to us clear that Chapter 15 of the National Bankruptcy Act covering Railroad *Adjustments,* in so far as allowances to others than the petitioner Railway are concerned, is not in *pari materia* with Title 11 United States Code, Section 205, 11 U. S. C. A. §205, which deals with the *Reorganization* of Railroads. * * *
>
> It seems to us that the omission of such a provision from Chapter 15 of the National Bankruptcy Act, which gave a three-judge court jurisdiction in *Proceeding for Railway Adjustment,* makes it quite clear that we have not any jurisdiction properly to grant any allowances herein to the intervenors or their counsel."

It is significant that the earlier applications were made on exactly the same basis as presently. Then as now petitioner Aronstam represented the Income Bondholders. Then as now the petitioner claimed

that his services were for the benefit of the Peoria as a whole, while in fact he was acting for the Income Bondholders.

III.

No basis existed for granting the allowances sought.

As we have seen, the order of May 21, 1943, designated Mr. Aronstam "as counsel to represent the Income Bondholders of the Peoria and Eastern Railway Company in these proceedings before the Special Master", and provided that "the said counsel, with the approval of the Special Master, may employ accountants and traffic experts to assist him in connection therewith" (R. 14). As the Special Court expressly held (R. 71) "his request then made for an order that the compensation for such representation be eventually charged against the estate of the petitioning debtor was unequivocally rejected by the court".

Not only was the matter of petitioners' right to compensation thus determined at the outset, but, as the Court expressly found, that the petitioner Aronstam "himself disclaims any retainer direct or indirect by or in behalf of the debtor (R. 71).

Further, petitioner Aronstam has had associated with him throughout the major part of this proceeding counsel for one Wood, the owner of $961,000 of Income Bonds, who in fact advanced a large proportion of the petitioner Aronstam's disbursements (R. 38, 46, 47). It is, we suggest, not likely that this association and participation was for any interest other than the Income Bondholders. Under these circumstances,

it is difficult to understand how the petitioners can now assert that any of their activities were compensable by the debtor.

Moreover, as the Court found, the debtor was otherwise adequately represented (R. 71) and therefore the Court could not properly charge against the estate "an expense incurred solely at the instance of the bondholders" (R. 71).

In this connection we respectfully point out that, despite the assertion of the petitioners to the contrary (Aronstam petition, p. 14), the undersigned did in fact carry on an exhaustive independent investigation of the accounts and transactions between the parties for the period from 1920 through 1942 (R. 63, 64, 65). Further, the nature of the independent representation of the Peoria may be seen from the fact that despite the claims running into the millions asserted by the petitioners the few claims actually allowed were those originated by independent counsel or supported by him (R. 58).

Nor is there any basis for the claim particularly pressed by Eppler (Petition for Writ of Certiorari, pp. 10-12) that had there been a receiver or trustee in this case, and had the petitioners rendered services for such receiver or trustee, they would have been entitled to compensation at the hands of the Court.

The fact is that under the statute no receiver or trustee could be appointed and none was necessary. (*Ewen, et al.* v. *Peoria & E. Ry. Co.,* 34 F. Supp. 332, 338.) The activities of the petitioners were all directed toward improving the position of the security holders they represented; any benefit to the Peoria was plainly incidental to this interest.

Finally, even if it were assumed that this were a case in which the Court had some equitable power to grant an allowance, such a grant would be governed by the well settled principle in analogous cases that such compensation, when and if awarded, is always related to the amount recovered. (*Winkelman* v. *General Motors Corp.*, 48 F. Supp. 504; *The Counsel Fee in Derivative Stockholders' Suits,* 39 Columbia Law Review 784 and cases therein cited.)

Here as we have seen (*ante,* pp. 6, 7), the action of the petitioners resulted in an actual loss to the debtor railroad in the sum of $96,396.70 (R. 55-57). Moreover, if we add up the claims of Mr. Aronstam and those of Eppler we find that they aggregate $252,842.24. As against this the benefits alleged to have been secured (assuming no loss on account of interest charges incurred) amounted to only $246,-240.68, or an excess of allowances claimed over benefits alleged of $6,601.56.

In this connection, it should also be noted that no benefit whatever was obtained through the services of Mr. Cook of Coverdale and Colpetts, for whom Mr. Aronstam seeks $10,092.53 or from the services of William Wyer & Co. claiming $3,069.65, or from the services of R. P. Patterson and his assistant for whom $4,980.83 is sought (R. 50-53; 59-60). Not only did no benefit result from the activities of these persons, but the petitioner Aronstam never even sought or obtained approval of their employment by the Special Master, despite the direction of the order of May 21, 1943, that such approval be obtained (R. 14).

It therefore seems clear that this is a case in which the petitioners, acting in the interests of their prin-

cipals, sought to impose a huge liability, which if sustained, would have necessarily resulted in substantial financial gain to their principals. In the final event, however, the result was that not only was this effort unsuccessful but the debtor railroad was caused to sustain substantial losses. Under the circumstances, there is no basis, equitable or otherwise, upon which these allowances could be granted.

CONCLUSION.

No reasons for review by this Court having been shown, the petitions for writs of certiorari should be denied.

Respectfully submitted,

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